Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

STEPHEN M. TUNSTALL,

Petitioner,

v.

R. HAROLD DEESE

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Stephen Mitchell Tunstall, Esq.
250 Congress Street
Mobile, Alabama 36603
(251) 432-2221

Pro Se Petitioner

Question Presented

Whether a Magistrate Judge's order imposing monetary sanctions against an attorney for unprofessional conduct can be predicated in whole or part on the intentional misrepresentations of opposing counsel.

List of Parties
and
Statement Pursuant to Supreme Court Rule 29.6

Petitioner is a private practicing attorney for Stephen M. Tunstall, P.C., which is a professional corporation with no parent corporation or publicly held company owning 10% or more of the corporation's stock. Stephen Tunstall is the corporation's sole officer, director and shareholder. Although not a party to the proceedings in this Court regarding this petition, Foreign Auto Parts of Mobile, Inc. and Professional Engine Service, Inc. are clients of Stephen Tunstall and were parties with him to the proceedings before the Eleventh Circuit. Foreign Auto Parts of Mobile, Inc. and Professional Engine Service, Inc., are privately owned entities, with no parent corporation and there is no publicly held company that owns 10% or more of their stock. Although not a party to the proceedings in this Court regarding this petition nor a party to the proceedings before the Eleventh Circuit, The Cincinnati Insurance Company is a party to the civil action made the basis of the non party subpoena issued by the Stephen Tunstall on behalf of his clients to the Respondent, Harold Deese.

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Opinions Below

The ruling of the United States Court of Appeals for the Eleventh Circuit dated August 15, 2006 affirming the decision of the District Court is found at 198 Fed.Appx. 831, 2006 WL 2351841 (C.A.11 (Fla.)), was not selected for publication in the Federal Reporter reported and is reproduced as Appendix A at 1a.

The decision and order of the United States District Court for the Northern District of Florida dated September 22, 2005 affirming the order of the Magistrate Judge's order imposing monetary sanctions against the attorney is found as a Slip Copy at 2005 WL 5277203 (N.D.Fla.), and is reproduced as Appendix B at 7a.

The decision and order of the United States Magistrate Judge for the Northern District of Florida dated March 10, 2005 determining the amount of the monetary sanctions against the attorney is not reported, and reproduced as Appendix C at 20a.

The decision and order of the United States Magistrate Judge for the Northern District of Florida dated December 9, 2004 imposing monetary sanctions against the attorney is not reported, and reproduced as Appendix D at 25a.

The order of the United States Court of Appeals for the Eleventh Circuit dated December 27, 2006 denying the motion to supplement the record on appeal is unreported, and reproduced as Appendix E at 34a

The order of the United States Court of Appeals for the Eleventh Circuit dated December 27, 2006 denying the petition for rehearing and rehearing en banc is reported at ---

F.3d ---- (11th Cir. (Fla.) Dec 27, 2006) (Table, No. 05-15461), and is reproduced as Appendix F at 35a.

Jurisdiction

The order of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on August 15, 2006. On September 2, 2006 petitioners' filed a timely petition for rehearing and rehearing en banc with the Eleventh Circuit under Rule 35 of the Federal Rules of Appellate Procedure. On December 27, 2006 the Eleventh Circuit entered an order denying the petition for rehearing and petition for rehearing en banc. This petition for a writ of certiorari is timely under 28 U.S.C. §2101 and Supreme Court Rule 13.1 and 13.3 because it is being filed within 90 days of the date of the denial of rehearing. This Court has jurisdiction to review the order of the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. §1254.

Rule of Civil Procedure Involved

The relevant rule of civil procedure involved is Rule 45 of the Federal Rules of Civil Procedure, set out at Appendix G at 36a.

Statement of the Case

The jurisdiction of the district court in the Southern District of Alabama was invoked under the Declaratory Judgment Act, 28 U.S.C. §2201, and diversity of citizenship, 28 U.S.C. §1332. The plaintiff filed a complaint for declaratory judgment in the U.S. District Court, Southern District of Alabama, against defendants regarding its obligation to pay amounts due under policies of insurance. The defendants filed state law tort counterclaims against the

plaintiff based on diversity of citizenship. The defendants' counsel later issued a subpoena duces tecum directed to a non-party located in the Northern District of Florida, which resulted in a motion to compel by the defendants and a motion for protective order by the non-party. The magistrate judge for the Northern District of Florida conducted a hearing regarding the motions, denied the motion to compel, granted the protective order and imposed monetary sanctions against counsel for the defendants, Stephen M. Tunstall.

A. Course of the Proceedings

On June 14, 1999 Plaintiff The Cincinnati Insurance Company ("Cincinnati") filed a Declaratory Judgment action in the Southern District of Alabama against Mathew Cochran, and later his two businesses Professional Engine Service, Inc. and Foreign Auto Parts of Mobile, Inc. (collectively "Cochran"). Cincinnati Insurance accused Cochran of burning his businesses, located in the same building, and refused to pay the claim. (R-12, Ex.A: Cincinnati's Complaint For Declaratory Judgment)

Ultimately, District Court Judge Hand permitted Cochran to assert counterclaims for breach of contract, bad faith, and conspiracy, all of which survived motions for summary judgment. Those allegations included Cincinnati conspiring with Harold Deese, Owen Posey and John Richardson to alter fire scene evidence and mislead authorities in order to deny the insurance claim. (R-12, Ex. II: 2/9/04 Order of Judge Hand)

On September 13, 2004 Cochran issued a subpoena by certified mail for production of documents to Fire Engineering Consultants, Inc./Harold Deese ("Deese") in the Northern District of Florida, which was served on September 21, 2004. On October 20, 2004, Cochran filed a Motion To

Compel based on the compromise agreement as to the production of certain documents. On November 10, 2004 Deese filed a motion for protective order, motion for sanctions, and response to motion to compel. (R-1: Cochran's Motion To Compel; and, R-2: Deese's Motion For Protective Order)

On December 8, 2004 Magistrate Davis in the Northern District of Florida conducted a hearing regarding these matters, and on December 9, 2004 and March 10, 2005 issued orders granting Deese's motion for protective order and imposed sanctions against Cochran's attorney Stephen Tunstall ("Tunstall") for alleged unprofessional conduct. (R-6: Appendix D, 12/9/04 Order of Magistrate Davis; and, R-8: Appendix C, 3/10/05 Order of Magistrate Davis)

Cochran and Tunstall appealed to Senior District Court Judge Vinson, who affirmed the decision of Magistrate Daivs. (R-58: Appendix B, 9/22/05 Order of Senior District Court Judge Vinson) Cochran and Tunstall then appealed to the Eleventh Circuit, a panel of which *per curium* affirmed the District Court. (Appendix A)

B. Facts

Cincinnati's civil action against Cochran in the Southern District of Alabama involved allegations that he committed arson. During the course of the case, evidence was uncovered that caused the district court in Alabama (District Court Judge Hand) to set aside its previous order of summary judgment in favor of Cincinnati regarding its allegations against Cochran and allowed Cochran to assert counterclaims that included breach of contract, bad faith and conspiracy. Cochran alleged that Cincinnati conspired with individuals including Deese, Owen Posey ("Posey") and John Richardson ("Richardson") to alter the fire scene evidence

and misled law enforcement authorities regarding the investigation and prosecution of Cochran. These counterclaims survived Cincinnati's motions for summary judgment. (R-12, Ex.A, II; and, Ex.K: Cochran's Amended Counterclaims)

It was discovered that in 1986 Deese was caught altering a fire scene at the "Spread Lounge" in Montgomery, Alabama by Gerald Maddox, a member of the arson division of the Montgomery Fire Department who went on to retire as Deputy State of Alabama Fire Marshall. At that time, Richardson met with Maddox and assured Maddox that he/his firm had not known about Deese's activities and would not use Deese again as a fire investigator/expert. (R-12, Ex.M: Deposition of Deputy State Fire Marshall Gerald W. Maddox).

Subsequently, it was discovered that on February 16, 1991 there was a fire at a residence located in Chickasaw, Alabama which Deese investigated for Richardson's firm. Deese concluded the fire was caused by arson based on physical evidence (fat lighter wood placed under the heater) which Chief Matthews, who was the arson investigator for the city, was certain was not present at the time of the fire or immediately thereafter. (R-12, Ex.N: Affidavit of City of Chickasaw Chief of Police Perry Matthews)

Regarding the fire in 1998 at Mr. Cochran's business which spawned this litigation, a City Fire Marshall came to the fire scene, investigated, released the scene, and concluded the fire was probably electrical. Thereafter, Deese came to the fire scene and was seen removing electrical evidence and stuffing it in his car trunk the day before he brought the electrical engineer Posey to the fire scene to rule out electrical as the cause of the fire. (R-12, Ex.P: Affidavit of City of Mobile Retired Fire Marshall Wayne S. Dean; Ex.Q:

Affidavit of Jimmy Allen Ramanauskas; and, Ex.R: Affidavit of Matthew Leath Cochran)

Among many other things, it was discovered that the diagram of the Fire Scene contained in Deese's report provided to the district court by Richardson's firm had been altered regarding the sample locations in order to give the appearance of two points of origin. (R-12,Ex.S: Deese's 2/2/99 letter to attorney John Richardson with diagrams of fire scene)

Subsequently, the Alabama state court set aside Mr. Cochran's conviction and dismissed the arson case against him. During those proceedings, the District Attorney did not oppose the state court's action. The D.A. noted that Deese had been the center of investigation based on Deese falsifying evidence of arson and that Deese's credibility was such that Mobile County District Judge Hardesty, the former prosecutor who tried Mr. Cochran's case, would not have tried the case at all had he known about Deese's unethical activities. The D.A. asserted that it did not intend to re-prosecute Mr. Cochran and the case was dismissed. (R-12, Ex.U: State of Alabama's Response To Rule 32 Petition).

When Cochran amended his counterclaims to include the allegations of conspiracy regarding Cincinnati, Richardson, Deese, and Posey, attorney Melissa Posey began representing her father, Owen Posey, and Deese. At that time, Ms. Posey began filing unsuccessful motions for sanctions and making repeated harassing telephone calls to Cochran's attorney, Tunstall. On one occasion she waited in Tunstall's parking lot, approached Mr. Cochran and Tunstall. when they arrived at the office, called Mr. Cochran a liar, and threatened to sue Mr. Cochran and Tunstall if they did not remove all reference to Posey and Deese from the pleadings. Ms. Posey sent a letter containing contrived information and

false allegations that Cochran and Tunstall were contacting Posey and Deese customers and slandering them. She again threatened to sue Tunstall and Cochran. Melissa Posey even began contacting another attorney whose separate law practice was located in the same building as Tunstall's in order to begin sending "messages" through that office, in addition to calling, faxing, emailing through Tunstall's office and personally coming to Tunstall's office. When she was told to communicate with Tunstall through his law office, she became rude to that attorney's secretary. (R12-Ex.BB: Melissa Posey 3/1/04 email to Stephen Tunstall; Ex.CC: Affidavit of Matthew Leath Cochran; Ex.DD: Melissa Posey 4/30/04 letter to Stephen Tunstall; Ex.EE: Affidavit of Sharla Phillips; Ex.FF: 4/13/05 Memorandum; and, Ex.GG: Robert Mudd 4/30/04 letter to Melissa Posey)

When the Southern District issued a Supplemental Rule 16(b) Scheduling Order and lifted the stay of discovery on August 20, 20054, Cochran issued the subpoena to Deese in the Northern District of Florida on September 13th, which was served by certified mail on September 21st. The subpoena sought proper documents relating to pending allegations, including conspiracy between Cincinnati, Richardson, Deese and Posey regarding the altering of fire scene evidence and misleading of law enforcement authorities in order to falsely deny insurance claims. (R-12, Ex.MM: 8/20/05 Order of Magistrate Cassady; and, R-1).

On October 7th and 8th the Magistrate in the Southern District of Alabama conducted hearings during which the court articulated the scope for the remaining discovery. As a result, on October 16, 2004 Tunstall sent Ms. Posey an email and pointed out that he had received no response to Cochran's subpoena to Deese or Posey. Tunstall requested that Ms. Posey conference with him to resolve the discovery issue regarding Deese and Posey and offered a

compromise that was within the scope of discovery articulated by the Magistrate. The compromise Tunstall offered Ms. Posey regarding Deese was that he provide all documents regarding origin and cause work performed regarding Cincinnati claims in which Richardson provided services from five years prior to Cochran's fire to the present; documents regarding payment for services regarding Mr. Cochran's civil and criminal case; and, documents regarding the Spread Lounge fire scene Deese is accused of altering. Tunstall made clear he would be going to New York regarding a deposition in Cochran's case, and provided his cell number for Ms. Posey to contact him. (R-57, page 5; R-20, minute entry 10-8-04; R-12, Ex.NN: Stephen Tunstall 10/16/04 letter to Melissa Posey).

On the morning of October 18, 2004 Ms. Posey contacted Tunstall by telephone in response to the email. At that time she represented to Tunstall that Posey had no additional documents responsive to Tunstall's offer of compromise regarding Cochran's subpoena to him. Ms. Posey represented that she was in agreement for Deese to prepare an estimate of the time and cost to Tunstall for Deese to pull those files relating to origin and cause work performed regarding Cincinnati claims from five years prior to the date of Cochran's fire to the present. Ms. Posey represented that it would be easier for Deese to not specify only those files involving Richardson but for Tunstall to determine that when he went through the files during production. Ms. Posey was to speak with Deese to determine if he would produce his file regarding the Spread Lounge fire scene he was accused of altering. Ms. Posey understood that the discovery completion date in the Southern District of Alabama was October 20, 2004. (R-12, Ex.OO: Stephen Tunstall 10/18/04 letter to Melissa Posey)

When Tunstall returned from New York to work on

the afternoon of October 20th, he received an email from Ms. Posey dated October 18 containing numerous false accusations, including alleging that Tunstall refused to speak with her, refused to confirm his email address, and incorrectly represented that the Northern District of Florida had to issue the subpoena to Deese in order for it to be valid. The letter culminates in misrepresenting that Tunstall agreed that Deese would only produce "information as to the number of other Cincinnati assignments he has worked on and the 1986 investigation file of the Spread Lounge, if his client approves its release." Obviously such would be of no benefit to Cochran. The letter was a surprise to Tunstall and the sequence of events appeared calculated to prevent Cochran from being able to file a timely Motion To Compel in the Northern District of Florida. (R-12, Ex.PP: Melissa Posey 10/18/04 email to Stephen Tunstall)

As a result, on the afternoon of October 20th Tunstall contacted the Clerk's Office of the Northern District of Florida and was instructed because of the time constraints to simply fax the motion. Cochran filed his Motion To Compel Deese to produce three specific items:

> The time and cost for Mr. Deese to produce for inspection / copying his entire Cincinnati Insurance fire claims investigation files from five years prior to 11-11-98 to the present; and,
> The aforementioned Cincinnati Insurance fire claims investigation files for inspection and copying, if Mr. Cochran agrees with the estimate of time and cost provided – within scope of his request; and,
> Produce for inspection / copying all documents regarding the 1986 incident in Montgomery, Alabama, in which Deese was accused of altering a fire scene, including his complete file regarding the August 7, 1986, Spread Lounge Fire at 428 Twain

Curve, Montgomery, Alabama. (R-1, page 3)

In addition, Tunstall again corresponded with Ms. Posey urging her to simply comply with the October 18th compromise agreement regarding the subpoena to Deese in order to resolve the Motion. On November 9, 2004 Ms. Posey contacted Tunstall's office and requested that he call her regarding Cochran's Motion To Compel. Tunstall agreed to pull his file when he arrived at his office, and contact Ms. Posey at the telephone number she provided. When Tunstall arrived at his office he pulled his file and attempted to contact her at the number given, however he received a fax sound and no answer. Consequently, in a further attempt to communicate, Tunstall utilized that telephone number to send Ms. Posey a facsimile letter regarding the matter. Ms. Posey then telephoned Tunstall at his office and made clear she would not comply with the October 18th understanding regarding the subpoena to Deese. Yet, Ms. Posey then sent Tunstall an email falsely representing that Tunstall had not consulted with her, refused talk to her on the phone and not allowed faxes. The email included a reference that she "promised the Court" she would file a response to the Motion that day. (R-12, Ex.QQ: Stephen Tunstall 10/22/04 letter to Melissa Posey; Ex.SS: Stephen Tunstall 11/9/04 letter to Melissa Posey; and, Ex.TT: Melissa Posey 11/9/04 email to Stephen Tunstall)

On November 10th, Ms. Posey filed a motion for protective order, motion for sanctions and response to the motion to compel. Thereafter Tunstall received a court notice that these matters would be taken up during a December 8th hearing in the Northern District of Florida before the Magistrate Davis. During that hearing, Ms. Posey addressed the court first and asserted numerous unsubstantiated allegations against Tunstall, including failure to communicate, in an attempt to explain her failure to file

timely objections to the subpoena to Deese. When Tunstall attempted to respond, he apparently misunderstood the Court's twice interrupting him and redirecting his argument to the subpoena and away from Ms. Posey's personal allegations as an encouragement not to respond because the court was not going to consider her unsworn statements, which were also unsupported by any evidence on file. Ms. Posey's arguments were nothing more than arguments of counsel. (R-2; R-4: Notice of Hearing; R-11: Transcript of Proceedings, page 1-11, page 17 line 13 to 19, page 27 line 12 to 25)

Notwithstanding, in the subsequent December 9, 2004 Order, Magistrate Davis accepted Ms. Posey's statements as fact. The Magistrate repeated misrepresentations by Ms. Posey and concluded:

> This was a disappointing reflection on his civility and professionalism that Mr. Tunstall made no effort to contest. (R-6, p.3 Fn1; Appendix D, page 27a)
>
> The court finds that Mr. Tunstall has failed to serve a valid subpoena, failed to take reasonable steps to avoid placing a burden on Mr. Deese, failed to cooperate in the resolution of the issues raised here, and *otherwise failed to act professionally. Ms. Posey requests fees and costs for resisting the subpoena. Given the lateness of her objections the court would ordinarily not be inclined to grant that request. However, since it appears this entire controversy was initiated and prolonged by Mr. Tunstall's actions, and because the lateness was largely caused by Mr. Tunstall's efforts at delay, the request will be granted.* (emphasis added) (R-6, Page 8 of 8; Appendix D, page 32a-33a).

As a result, an Order was entered incorrectly depicting Tunstall as having acted unprofessionally and directing him to pay Melissa Posey $3,505.64 and Deese $1,215.75 based on the false representations of Ms. Posey.

C. The Decisions Below

When Tunstall appealed the Magistrate's decision to Senior District Court Judge Vinson in the Northern District of Florida, he presented the District Court with overwhelming evidence that Ms. Posey made intentional misrepresentations to the Magistrate in order to falsely depict Tunstall as unprofessional and obtain sanctions against him. (R-12 & R-57) The District Court was provided clear evidence that Ms. Posey had misrepresented to the Magistrate in the Northern District of Florida that the Magistrate in the Southern District of Alabama had denied Cochran the right to discover documents he was requesting from Deese (R-57 pages 4 to 6, paragraphs 3 to 12).

Clear evidence was also provided that Ms. Posey's representation to the Magistrate as to why she failed to timely object to the subpoena was false. At the same time Ms. Posey represented she was prevented or banned from communicating with Tunstall regarding the subpoena to Deese, she was actually sending Tunstall correspondence by email, fax, and U.S. Mail. (R57 page 12 paragraphs 1 to 2) The District Court was provided evidence that on the same date Ms. Posey sent Tunstall an email alleging she was barred from talking on the phone to him, she actually spoke with him twice – once on Tunstall's cell phone and once on Tunstall's office phone. (R-12 p.16-17, ¶ 13 to 14; Ex.SS; Stephen Tunstall 11/9/04 letter to Melissa Posey; and, Ex.TT) The District Court was provided clear evidence that Ms. Posey's proof of alleged mailings to Tunstall were false

and created in an attempt to close the time gap in Deese's failure to object to the subpoena. (R-57 p.18-20, ¶16 to 19)

When presented with this information, the District Court allowed Deese a delay in filing his Brief in order for him to obtain and file, as additional evidence, transcripts from conference calls occurring with the Magistrate in the Southern District of Alabama. This additional evidence did not establish or support any of Deese and Ms. Posey's representations. (R-14: Deese's Motion To Extend Time To Respond To Appellants' Brief; Ex.15: Senior Judge Vinson 4/28/05 Order; Ex.21: Senior Judge Vinson 5/5/05 Order; Ex.22: Deese's Motion To Extend Time For Transcript; Ex.24: Senior Judge Vinson 5/9/05 Order; R-57, pages 3 to 9). The District Court ultimately affirmed the Magistrate's Order.

In reaching its decision, the District Court found,

> "On October 18, 2004, Tunstall wrote a confirmatory letter summarizing his understanding of the resolution upon which the two parties had agreed." (R-58: Senior Judge Vinson 9/22/05 Order, page 3; Appendix B, page 9a-10a)

The District Court's Order goes on to note correspondence sent by Tunstall to Ms. Posey, requests by Tunstall for Ms. Posey to contact him by cellular telephone to discuss the subpoena, Ms. Posey contacting Tunstall by telephone in response and the contradictions in Ms. Posey's representations on behalf of Deese. (Appendix B, page 9a-10a) However the District Court's Order concludes that,

> "The problem with defendant's proffer of new evidence on appeal, however, is that this court is limited to reviewing the magistrate judge's order

> under a clearly erroneous standard. Under the clearly erroneous standard, it is inappropriate to consider evidence not presented to the magistrate judge." (R-58, page10; Appendix B, page 18a)

Yet, the Magistrate's Order imposing sanctions on Tunstall referenced unprofessional conduct by attorney Tunstall based on the clear misrepresentations of Ms. Posey, unsupported by evidence, culminating in the Magistrate's decision that Tunstall "failed to act professionally". There was no evidence to support this finding by the Magistrate. (R-6, p. 3 Footnote 1, and p. 8; Appendix D, page 27a)

The subsequent District Court's Order is devoid of any finding of unprofessional conduct by Tunstall, thereby implicitly rejecting any evidentiary basis for a conclusion that Tunstall "failed to act professionally". The District Court nevertheless proceeded to affirm, stating:

> Further, even if I disregard the Magistrate Judge's finding that Tunstall acted unprofessionally, the magistrate judge also imposed sanctions because the defendant issued an invalid subpoena and failed to take reasonable steps to prevent an undue burden on the non-party. Based on a review of the original subpoena issued, the magistrate's conclusion that the subpoena was overly broad and created an undue burden on non-party Deese is fully supported by the record. Although the defendant did significantly narrow the scope of his discovery requests in subsequent conversations with Deese's attorney and through his motion to compel, it was the originally invalid and overly broad subpoena that caused Posey and Deese to invest time and effort in attempting to obtain relief. Therefore, the magistrate judge's imposition of sanctions was not clearly erroneous or

contrary to law. (R-58, p.11; Appendix B, page 18a-19a)

The District Courts' affirmation appears to be based on the belief that the Magistrate' Order imposing sanctions should be affirmed because the subpoena was invalid in spite of the fact that the Magistrate made clear that:

> Given the lateness of her objections the court would ordinarily not be inclined to grant that request. However, since it appears this entire controversy was initiated and prolonged by Mr. Tunstall's actions, and because the lateness was largely caused by Mr. Tunstall's efforts at delay, the request will be granted. (R-6, p. 8; Appendix D, page 32a-33a)

The Magistrate's Order imposing sanctions makes clear that the reason the court imposed sanctions was the purported unprofessional conduct by Tunstall, as misrepresented by Ms. Posey during the December 8, 2004 hearing. The evidence subsequently provided by Appellants to the District Court, made clear that Ms. Posey representations to the Magistrate were false. (R-12 and R-57)

In Cochran and Tunstall's appeal to the Eleventh Circuit, they filed one Motion To Amend/Supplement the Record containing R-12 and R-57, which was returned unfiled by the Clerk because those documents presented to the District Court were deemed part of the record. Cochran and Tunstall then filed a second Motion To Amend or Supplement The Record to include the affidavit of Tunstall swearing to the content of R-12 and R-57, however, that motion was not ruled on by the Eleventh Circuit prior to a panel of which *per curium* affirmed the District Court[1].

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[1] Tunstall's affidavit enumerated his service to the bar association as the past president of the young lawyer's section and a member of the bar's

On December 27, 2006 the Eleventh Circuit panel denied Cochran and Tunstall's petition for rehearing and rehearing en banc and denied the Motion To Amend or Supplement the Record previously filed during the original briefing schedule.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit affirmed Senior Judge Vinson's refusal to consider the evidence clearly establishing that Posey's representations to Magistrate Davis were false. Such is a clear departure from the accepted and usual course of judicial proceedings when an attorney is shown to be a direct participant in a deliberate plan to defraud the court.

The law is well settled that a federal court has the inherent power to vacate its own judgment upon proof that a fraud has been perpetrated upon the Court or to conduct an independent investigation in order to determine whether it has been the victim of fraud. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) and citing *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946)).

While pending in the district court, Senior District Judge Vinson allowed Deese and Posey a delay in the briefing schedule to obtain and proffer new evidence to the district court in response to Tunstall's evidence of their fraud. (R-14,15,21,24). However, in his subsequent decision,

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board. Tunstall's affidavit pointed out that he has served as a specially appointed district court judge for Mobile County, Alabama and also served in various municipalities a substitute judge and prosecutor. In addition, Tunstall's affidavit made clear that he was swearing to the truthfulness of the evidence and the representations made before the district court

Senior Judge Vinson rejected Tunstall's new evidence because it had "not been presented to the magistrate judge." (R-58, page 10; Appendix, page 18a).

Subsequently, the Eleventh Circuit affirmed Senior Judge Vinson's decision, finding that Tunstall's evidence was (1) not earlier unavailable (i.e., not newly-discovered), (2) was not presented to the magistrate judge (i.e., not appropriate to consider evidence not presented to the magistrate judge), and (3) the magistrate also found that the subpoena was invalid and overly broad (i.e., not the only basis for sanctions). (Eleventh Circuit order, page 5-6; Appendix A, page 5a-6a). Such is not a proper analysis when the court is presented with evidence that an attorney has intentionally misled court.

In *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944), overruled on other grounds *Standard Oil v. United States*, 419 U.S. 17, 18 (1976), this Court addressed a fraud on the court involving attorneys on behalf of their client, found the fraud demanded the exercise of the historic power of equity to set aside the fraudulently begotten judgments in the district and circuit court. *Id.* at 245. As in the petition before this Court, in *Hazel-Atlas* the circuit court refused to set aside the judgment of the district and circuit court by holding that the fraud was not newly-discovered, not the primary basis for the judgment, and the circuit court lacked the power. *Id.* at 243-244. However, this Court found that even if the petitioner had not exercised the highest degree of diligence in uncovering the fraud, the fraud cannot be condoned for that reason alone. *Id.* at 246. Further, this Court found that whether or not the fraud was the primary basis of the lower court's opinion, the fraud made an impression on the lower court as shown in the lower court's opinion. *See id.* at 246-247. This Court also acknowledged that:

> "...tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Id.* at 246.

Lastly, as in the petition before this Court, the Court found that "the trail of fraud continued without break through the District Court and up to the Circuit Court of Appeals." and "Had the District Court learned of the fraud on the Patent Office at the original infringement trial, it would have been warranted in dismissing Hartford's case." *Id.* at 250.

As in *Hazel-Atlas,* Tunstall, right or wrong, understood that the Magistrate was directing him to not respond to Posey's allegations of unprofessional conduct and Posey's fraud cannot be condoned for that reason alone; Posey's false allegations of unprofessional conduct by Tunstall apparently impressed the Magistrate Judge as it was the stated basis of his decision to impose monetary sanctions; and, the District Court erroneously concluded that could not consider the evidence establishing Posey's fraud on the court.

As a result of the District Court's incorrect belief that it could not consider the evidence establishing the fraud, it affirmed the Magistrate by concluding that the subpoena was

"originally invalid and overly broad"[2] as a basis for sanctions against Tunstall. However, a subpoena being "originally invalid and overly broad" is different from a magistrate's conclusion that the attorney engaged in unprofessional conduct warranting the imposition of monetary sanctions. Magistrate Davis' incorrect conclusion of unprofessional conduct by Tunstall remains to date and its serious putative effect was immediate. The Clerk of this Court has declined to allow Tunstall admission to the Bar of this Court because a review of Magistrate Davis's order led the Clerk to the conclusion that Tunstall has been the subject of adverse disciplinary action within 3 years pursuant to Supreme Court Rule 5. Furthermore, there can be no doubt that litigants in future legal proceedings will attempt to use the magistrate's incorrect finding of unprofessional conduct against Tunstall and the position of Tunstall's clients. The effect of the Magistrate's incorrect finding could last for the remainder of Tunstall's legal career.

The Magistrate's decision to impose monetary sanctions was clearly predicated on a finding of unprofessional conduct by Tunstall, as an explanation for Deese's untimely objection to the subpoena, and the stated reason the Magistrate imposed sanctions on Tunstall. There was no evidence to support the Magistrate's finding of unprofessional conduct and the statements of Posey in briefing and oral argument are not evidence of unprofessional

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[2] While unnecessary for purposes of the issue raised in this Petition, the original subpoena was not overly broad. The original subpoena sought discovery from the insurance company's fire investigator, Deese, located in the Northern District of Florida regarding allegations pending in the Southern District of Alabama that the insurance company conspired with Deese to alter fire scene evidence and mislead law enforcement to falsely prosecute the insured. The allegation that the insurance company conspired with Deese had survived motions for summary judgment and was supported by evidence from two law enforcement officers in prior fire insurance cases investigated by Deese.

conduct. *See Galen Medical Associates, Inc. v. United States*, 369 F. 3d 1324, 1139 (Fed.Cir.2004).

Because there was no evidence to support the Magistrate' finding of unprofessional conduct, on appeal, the District Court did not find any unprofessional conduct by Tunstall. However, the District Court affirmed the Magistrate's order by reasoning that the subpoena itself was invalid. The District Court cannot avoid the Magistrate's finding of unprofessional conduct regarding Tunstall based on Posey's fraud or its punitive effect on Tunstall's reputation, as that finding was the Magistrate's stated basis for his decision to impose sanctions.

The District Court and the Eleventh Circuit were presented with clear evidence that Posey, as an officer of the court, had intentionally misled the Magistrate and, subsequently, the District Court, by presenting false documentation and making false representations to the court on behalf of her client Deese. However, the District Court and the Eleventh Circuit refused to consider this evidence[3] improperly concluding that the "clearly erroneous standard" prevents a court from considering evidence of a fraud upon the court by an attorney on behalf of a client.

In reversing the Eighth Circuit's suspension of an attorney, this Court noted in *In re Synder*, 472 U.S. 634 (1985) an attorney is "an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *Id.* at 644 (quoting *People ex rel Karlin v. Culkin*,

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[3] On appeal before a panel of the Eleventh Circuit, Tunstall again presented the same evidence provided to the District Court regarding Posey's fraud and filed a motion to supplement the record with his affidavit incorporating the evidence for consideration by the court, however, the Eleventh Circuit affirmed the District Court without ruling on the motion. When Tunstall raised this issue in a petition for rehearing, the Eleventh Circuit then denied the motion without opinion.

248 N.Y. 465, 470-471 (1928). The Court found that "as an officer of the court, a member of the bar enjoys singular powers that others do not possess..." and "[t]he license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice. *Id.* 644-645.

As a result of an attorney being an officer of the court, "[u]nder certain circumstances, attorney misconduct may constitute fraud on the court." *See Securities & Exchange Commission v. ESM Group, Inc.*, 835 F.2d 270, 274 (11th Cir. 1988). Fraud on the court attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. *See Traveler's Indemnity Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985) (quoting 7 J. Moore & J. Lucas, *Moore's Federal Practice*, para. 60.33).

Although Tunstall presented clear evidence that Posey, as an officer of the court, intentionally presented false documentation and made false representations regarding Tunstall to mislead the Magistrate Judge and, subsequently, the District Court, neither the District Court nor the Eleventh Circuit considered the evidence or conducted an analysis as to whether Posey committed misconduct constituting a fraud on the court.

A district court "has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud." and to vacate its earlier judgment. *See In re E.I. DuPont De Nemours & Company-Benlate Litigation*, 99 F.3d 363, 367 (1996) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991))

In *Hormel v. Helvering*, 312 U.S. 552 (1941), this

Court stated that :

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." and that "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Id.* at 557.

In *Schwartz v. Millon Air, Inc.* 341 F.3d 1220 (11th Cir. 2003), the Eleventh Circuit, a panel of which was led by Chief Judge Edmundson[4] reversed the district court's award of sanctions against two pro se attorneys, granted their motion to supplement the record to include the exhibits from the case files of their former clients which included photocopies of altered medical records, and concluded the record failed to support that the two attorneys' conduct was tantamount to bad faith. *Id.* at 1225 n.4 & 1226.

In *Universal Oil Products Co. v. Refining Co.*, 328 U.S. 575 (1946), this Court stated it was beyond question that a federal court has the inherent power to investigate whether a judgment was obtained by fraud and that the power to

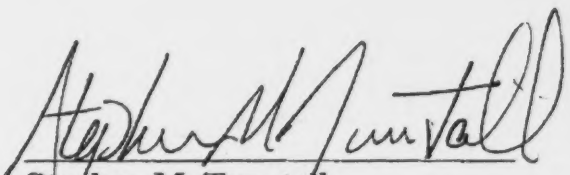
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[4] Chief Judge Edmundson denied Tunstall's motion to supplement the record with the evidence establishing the fraud upon the district court regarding the erroneous ruling of unprofessional conduct by Tunstall as the basis for the imposition of sanctions.

unearth such a fraud is the power to unearth it effectively. Further, the Court made clear that, if the federal court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties. *Id.* at 580.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Eleventh Circuit reversed, the judgment of the District Court set aside, and the District Court's order affirming the Magistrate's finding of unprofessional conduct and imposing sanctions reversed.



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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
August 15, 2006
THOMAS K. KAHN
CLERK

No. 05-15461
Non-Argument Calendar

D.C. Docket No. 05-00093-CV-5-RV-MD

CINCINNATI INSURANCE COMPANY,
Plaintiff,

R. HAROLD DEESE,
Interested Party-Appellee,

versus

MATTHEW LEATH COCHRAN,
FOREIGN AUTO PARTS OF MOBILE INC.,
PROFESSIONAL ENGINE SERVICE OF MOBILE,

Defendants-Appellants,

STEPHEN M. TUNSTALL,
Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(August 15,2006)

APPENDIX A

Before EDMONDSON, Chief Judge, ANDERSON and BIRCH, Circuit Judges.

PERCURIAM:

Appellant Matthew Leath Cochran, defendant in a declaratory judgment action brought by Cincinnati Insurance Co. in the United States District Court for the Southern District of Alabama (the "Cincinnati Insurance action"),[1] appeals a discovery order and award of sanctions of the United States District Court for the Northern District of Florida, in favor of Appellee Fire Engineering Consultants, Inc./ Harold Deese,[2] a non-party witness in the Cincinnati Insurance action. No reversible error has been shown; we affirm.

As part of discovery in the Cincinnati Insurance action, on 21 September 2004, Appellant issued a subpoena duces tecum in the name of the United States District Court for the Northern District of Florida to Appellee, who is located in Panama City, Florida (more than 100 miles from the Southern District of Alabama). When no discovery was forthcoming from Appellee, on 20 October

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[1] Also named as defendants in the Cincinnati Insurance action were two businesses of Appellant Cochran, Foreign Auto Parts of Mobile, Inc., and Professional Engine Service of Mobile.

[2] The discovery motion in the Northern District of Florida was brought naming "Fire Engineering Consultants, Inc./Harold Deese." As the magistrate judge observed, the record is much confused about who, if anyone, was served. Complicating the matter further, it seems that only Deese appeared in opposition to the motion to compel.

APPENDIX A

2004, Appellant made a motion to compel in the district court in Florida. Appellee responded to this motion with a motion to quash and for sanctions. A hearing was held on the motion to compel and the motion to quash and for sanctions before a magistrate judge on 8 December 2004. Much of that hearing focused on infirmities in the subpoena duces tecum, the timeliness of the motion to compel, and the timeliness of the motion to quash and for sanctions. The magistrate judge determined that (i) the subpoena - if it was served — failed to comply with Fed.R.Civ.P. 45, was invalid and unenforceable; (ii) no reasonable steps were taken to avoid placing an undue burden on a non-party; (iii) the motion to compel was untimely; and (iv) the motion for protective order was due to be granted. In awarding sanctions, the magistrate judge noted — in addition to the invalidity of the subpoena and the failure to take reasonable steps to avoid placing an undue burden on Appellee — that Appellant's counsel had failed to cooperate and otherwise failed to act professionally. Sanctions were awarded after receipt of Appellee's statement of expenses incurred responding to the invalid subpoena and motion to compel; Appellant filed no response in opposition to the requested expenses. Appellant appealed the protective order and the sanctions imposed to a district judge.

APPENDIX A

The district court also determined that the subpoena duces tecum was due to be quashed and Appellant's motion to compel - which the court also considered untimely filed - denied because the subpoena failed to comply in many respects with the requirements of Rule 45.[3] Appellant argued before the district court and again argues on appeal that the subpoena was issued in good faith; Appellant does not — and can not reasonably — argue that the subpoena satisfied applicable procedural requirements.

The district court also affirmed the imposition of sanctions. Appellant challenged the sanctions by (i) arguing that no sufficient notice and opportunity to be heard preceded the sanction judgment, and (ii) taking issue with the facts upon which the magistrate relied. Appellant repeats those challenges in this appeal.

About Appellant's contention that insufficient notice and opportunity to be heard preceded the imposition of sanctions, we note, as did the district court, that Appellant was given notice that the hearing before the magistrate was to address Appellant's motion to compel and to address Appellee's motion for protective order and sanctions. Appellant was afforded adequate notice; he could have

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[3] Both the magistrate judge and the district judge noted that procedural defects in a subpoena usually may be cured by amendment and reservice. Because the period for discovery had expired in the Cincinnati Insurance action, the Appellant would need to seek an extension of discovery in the Southern District of Alabama before seeking to amend the subpoena.

addressed the motion for sanctions by filing a memorandum in opposition -- as required by Local Rule 7.1- and by arguing against the motion at the hearing. Appellant chose neither course.[4] Appellant was afforded sufficient opportunity to be heard.

In the district court, Appellant sought to introduce affidavits and orders entered in the Cincinnatti Insurance action in an effort to show that the magistrate judge erred in concluding that Appellant had acted unprofessionally. Appellant contended that these belatedly proffered materials showed that the magistrate judge relied on misstatements of fact and purposeful distortions made by Appellee's counsel at the hearing. The district court refused to consider this new evidence; the materials proffered were not earlier unavailable to Appellant but were not presented to the magistrate judge. Nonetheless, the district court determined that even if the magistrate's finding of unprofessionalism was disregarded, the magistrate's imposition of sanctions was due to be affirmed based on the magistrate's findings that the subpoena was invalid and overly broad.

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[4] Appellant's brief concedes that he decided to focus on his motion to compel and to ignore his adversary's attacks. Although Appellant does contend that he was twice interrupted when he attempted to respond to assertions made by Appellee, the record discloses that Appellant had ample opportunity to contest the imposition of sanctions.

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Again on appeal Appellant seeks to argue the factual determinations underlying the magistrate's decision that counsel acted unprofessionally; and again, he relies on evidence that was not before the magistrate judge and that the district court refused expressly to consider. But Appellant takes no issue with the factual findings that the subpoena duces tecum issued to Appellee was invalid and that the subpoena, as originally issued, was overly broad and imposed an undue burden on a non-party. Based on these findings — which are supported by the record — we can not say that the district court abused its discretion when it determined that the imposition of monetary sanctions was neither clearly erroneous nor contrary to law.

AFFIRMED.

APPENDIX B

Case 5:05-cv-00093-RV-MD Document 58 Filed 09/22/2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

THE CINCINNATI INSURANCE COMPANY,

Plaintiff,

v. Case No. 5:05cv93/RV/MD

MATTHEW LEATH COCHRAN

Defendant.
_____/

ORDER

Pending is the defendant's objection to Magistrate Judge Davis' orders of December 9, 2004, and March 10, 2005. (Doc. 12).

Magistrate Judge Davis denied defendant Matthew Leath Cochran's motion to compel a subpoena *duces tecum* issued to Fire Engineering Consultants, Inc. The magistrate judge also granted a motion for protective order and motion for sanctions filed by nonparty R. Harold Deese in reference to the subpoena *duces tecum*. Pursuant to Rule 72(a), Federal Rules of Civil Procedure, defendant has filed this objection to the Magistrate's orders.

I. BACKGROUND

In 1999, Cincinnati Insurance Company ("Cincinnati Insurance") filed a declaratory judgment action in the United

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States District Court for the Southern District of Alabama against defendant Matthew Leath Cochran, seeking to deny coverage on a fire insurance policy, based on Cincinnati Insurance's allegation that Cochran set fire to his own business. In return, Cochran asserted counterclaims against Cincinnati Insurance for Breach of Contract, Bad Faith and Conspiracy, alleging that Cincinnati Insurance conspired with an independent fire investigator, R. Harold Deese, as well as others, to alter the fire scene in order to deny his claim.

The procedural history of this case is long and convoluted and has been described by United States District Court Judge Charles R. Butler as a "procedural nightmare."[1] After five years of litigation, this case was set for a pretrial conference on February 2, 2004, before Senior Judge W. Brevard Hand.[2] When the defendant submitted his proposed pretrial order, there was a dispute about the factual allegations in support of defendant's counterclaim for conspiracy. Specifically, defendant alleged that plaintiff's experts, Harold Deese and Owen Posey, fabricated evidence of arson, and that plaintiff's counsel, John Richardson, conspired to prosecute Cochran for arson. The plaintiffs moved to strike these allegations, and Judge Hand decided to continue the jury trial and to grant the defendant leave to amend the counterclaim in order to clarify the specific nature of the allegations relating to the conspiracy claim.[3] Subsequently, on March 3, 2004, Judge Callie V. S. Granade,

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[1] See Order, dated August 5, 2004, attached as Exhibit LL to Defendant's Brief.

[2] Judge Hand stepped down from the case during 2004, and the case was transferred to Judge Granade. However, Judge Callie Granade, thereafter, recused herself, and the case was then transferred to Judge Butler.

[3] Defendant's Brief, Doc. 12, Ex. LL.

to whom the case had been assigned, referred the matter to a magistrate judge so that a scheduling order could be entered allowing the parties to engage in discovery "solely on the new issues raised by the amended counterclaims."

After the defendant alleged that Richardson and Deese conspired to alter the fire scene and maliciously prosecute him, Richardson and his law firm, as well as Deese, sought to intervene in the lawsuit. The court entered a stay of discovery while questions of the jurisdiction of the interveners were being resolved. The discovery stay was lifted on August 23, 2004, and the remaining limited discovery was scheduled to be completed by October 20, 2004. On September 13, 2004, defendant issued a subpoena *duces tecum* to Fire Engineering Consultants, Inc., which is Harold Deese's investigation firm. Defendant sent the subpoena *duces tecum* by certified mail addressed to Harold Deese in Panama City, Florida. On September 21, 2004, an individual named A. Stevens signed for the subpoena *duces tecum*.

Due to hurricane Ivan which hit the Panama City and Pensacola area on September 16, 2004, Deese was not able to contact his attorney until the first week of October 2004. Subsequently, on approximately October 13, 2004, Deese's attorney, Melissa A. Posey, sent a certified letter to the defendant's attorney, Steven M. Tunstall, outlining several procedural deficiencies in the subpoena. However, the letters were returned to Posey unclaimed after several attempted deliveries by the United States Postal Service. Tunstall sent Posey a letter, dated October 16, 2004,[4] requesting the status of the production of documents and suggesting that Posey contact him via his cellular phone to discuss the subpoena.

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[4] 4 Deese asserts that defendant did not mail the letter until October 18, 2004, but Deese's attorney admits that she called defendant's attorney on October 18, 2004, in response to the letter.

In response, Posey contacted Tunstall on October 18, 2004. The two attorneys discussed the scope of the subpoena, as well as the costs of producing the documents, and both attorneys thought that they had reached a mutual agreement.

On October 18, 2004, Tunstall wrote a confirmatory letter summarizing his understanding of the resolution upon which the two parties had agreed. Tunstall noted that Deese was to prepare an estimate of the time and cost in pulling the files related to the subpoena *duces tecum*, and Deese would forward the files "regarding origin and cause work performed regarding Cincinnati Insurance claims from five years prior to the date of Mr. Cochran's fire (11/11/98) to the present." Further, Deese would notify the defendant if he would be producing all documents relating to his 1986 investigation of a fire in Montgomery, Alabama. However, on October 20, 2004, Posey wrote a letter to Tunstall, confirming her understanding of the agreement reached on October 18, 2004. The summary outlined in Posey's confirmation letter had several conflicts with Tunstall's summary. As a result, defendant filed a motion to compel in this court on October 26, 2004.[5] On November 9, 2004, Tunstall acknowledged that Deese contacted him via telephone earlier that morning to discuss a resolution. However, Tunstall wrote that when he tried to re-contact Posey after pulling the case file, he was unable to make contact. On November, 9, 2004, Deese filed a motion for protective order and a motion for sanctions.

On December 8, 2004, Magistrate Judge Davis conducted a hearing regarding the defendant's motion to

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[5] Apparently the defendant faxed the motion to compel to the clerk of court on October 20, 2004, after he was informed by a deputy clerk that he could fax the motion and then send it via the mail. However, as noted by the magistrate judge's order, there is no fax on file, and this court does not accept faxed filings without leave of the presiding judge. *See* Order, Doc. 6, p.7.

compel and Deese's motion for protective order and motion for sanctions. After the hearing, Magistrate Judge Davis denied the defendant's motion and granted the Deese's motion for protective order and motion for sanctions. Subsequently, on March 10, 2005, the magistrate judge ordered Tunstall to pay $3,505.64 to Posey for attorney's fees and $1,1215.75 to Deese for expenses associated with obtaining relief from the defendant's subpoena. The defendant now appeals the magistrate judge's order.

II. STANDARD OF REVIEW

A magistrate judge is permitted to hear and determine any nondispositive pretrial matter pending before the court, including discovery matters, and the decision of the magistrate judge is a final decision. 28 U.S.C. §636(b)(1)(A) (2004). If a party objects to the magistrate judge's order, a district court may set aside or modify the order only if the district court finds that the magistrate's order is "clearly erroneous or contrary to law." 28 U.S.C. §636(b)(1)(A); Fed. R. Civ. P. 72(a). See also, In re Commissioner's Subpoenas, 325 F.3d 1287, 1292 (11th Cir. 2003); Haines v. Liqqett Group Inc., 975 F.2d 81, 91 (3d Cir. 1992)("the review of the district court is circumscribed: the district court is bound by the clearly erroneous rule in reviewing questions of fact).

A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Pullman-Standard v. Swint, 456 U.S. 273, 285 n.14, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982). See also, Johnson v. Hamrick, 296 F.3d 1065, 1074 (11th Cir. 2002). The question for the reviewing court is not whether the finding is the best or only conclusion that can be drawn from the evidence. Instead, the test is whether there is evidence in the record to support the lower court's findings,

and whether its construction of that evidence is a reasonable one. Heights Community Congress v. Hilltop Realty, Inc., 774 F.2d 135, 140-41 (6th Cir. 1985).

III. DISCUSSION

A. Motion to Compel

The magistrate judge denied the defendant's motion to compel and quashed the defendant's subpoena *duces tecum* based on the conclusion that the subpoena did not comply with the mandates of Rule 45 of the Federal Rules of Civil Procedure; therefore, the subpoena was invalid and could not be enforced. Notably, in defendant's brief requesting this court to set aside the magistrate judge's order, the defendant does not offer any objection to the determination that the subpoena contained numerous defects in form and service.

Indeed, it appears that the subpoena issued by the defendant to the non-party witness did not comply with Rule 45. For example. Rule 45(a)(1) of the Federal Rules of Civil Procedure provides that every subpoena shall:

> (A) state the name of the court from which it is issued; and
>
> (B) state the title of the action, the name of the court in which it is pending, and its civil action number; and
>
> (C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and
>
> (D) set forth the test of subdivisions (c) and (d) of this rule.

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Subsections (c) and (d) of Rule 45 describes certain protections and rights for the party being subpoenaed, and certain obligations of the party issuing the subpoena. Relevant to this dispute, subsection (c)(1) provides that: "A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." Moreover, subsection (c)(3)(A) provides that a court may quash or modify a subpoena if the subpoena "requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business" or "subjects a person to undue burden." Fed.R.Civ.P. 45(c)(3)(A)(ii), (iv).

In this case, the subpoena issued to Deese did not state the name of the court in which the action was pending. Instead, it stated the Northern District of Florida, while the action to which the subpoena pertained was actually pending in the Southern District of Alabama. Further, the subpoena did not "set forth the text of subdivisions (c) and (d) of [Rule 45]." Therefore, the non-party to whom it was issued was not instructed on certain rights and obligations concerning the subpoena, such as the appropriate relief the non-party could seek if he were required to travel more than 100 miles.

The form of the subpoena also did not comply with Rule 45 because it did not specify a place where the non-party could produce or permit inspection of the documents, except the address of the defendant's attorney in Mobile, Alabama. The defendant did not compel the production of the documents in the Northern District of Florida, even though the documents were located within this district. Instead, it appeared from the face of the subpoena that Deese could either travel to Mobile,

Alabama, to produce the documents, or mail them to Tunstall's Mobile office. Nevertheless, no fees or expenses were tendered for appearance in or travel, nor did the defendant tender fees for mailing and copying the voluminous documents requested. Failing to tender the applicable sums and fees in advance, with the subpoena, may make the subpoena invalid. See CF&I Steel Corp. v. Mitsui & Co., 713 F.2d 494 (9th Cir. 1983).

Based on all of these deficiencies, the magistrate judge determined that the subpoena was invalid and must be quashed. The magistrate judge's order quashing the subpoena and denying the defendant's motion to compel on the basis that the subpoena was not in compliance with Rule 45 was correct, and certainly not clearly erroneous or contrary to law. See e.g., In re Silicone Gel Breast Implants Prod. Liability Litigation, 1996 WL 1358526, *1n. 1 (N.D. Ala. 1996)(court will deny motion to enforce subpoena where the subpoena is not in compliance with Rule 45); Smith v. Midland Brake. Inc., 162 F.R.D. 683, 686 (D. Kan. 1995)(holding that a court cannot compel a party to comply with a subpoena *duces tecum* which is not properly issued or served).[6]

B. Sanctions

The gravamen of the defendant's objection to the

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[6] The magistrate judge noted that procedural defects in a subpoena can generally be cured by amendment and reservice, but according to the scheduling order entered by the District Court for the Southern District of Alabama, the discovery deadline had already passed at the time the magistrate judge denied defendant's motion to compel based on the defective subpoena. Reasoning that he should not extend the discovery deadline imposed by another court where the action was pending, the magistrate judge explained that the defendant would have to seek an extension from the Court in the Southern District of Alabama before amending the subpoena.

magistrate judge's order centers upon the imposition of sanctions on the defendant's attorney, Tunstall. The imposition of discovery sanctions is within the magistrate's power under Title 28, United States Code, Section 636(b)(1)(A). See Merritt v. Intel Broth of Boilermakers, 649 F.2d 1013, 1016-1017 (5th Cir. 1981). Rule 45 provides that a court may enforce the issuing party's obligation to take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena "by imposing upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee." Fed. R. Civ. P. 45(c)(1). Further, Rule 26 of the Federal Rules of Civil Procedure permits a court on its own initiative or upon a motion to sanction an attorney for signing a discovery request which is unreasonable or unduly burdensome or expensive, considering factors such as the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. Fed. R. Civ. P. 26(g)(2)(c) and (g)(3). It is the standard practice in this Court for the losers in discovery disputes that are not based on reasonable grounds to have sanctions imposed.

Defendant suggests that he did not receive adequate notice and an opportunity to be heard before the sanctions judgment was entered. Defendant posits in his brief objecting to the magistrate's order that "it is important for an attorney or anyone close to be informed that the Court was contemplating sanctions and be given an opportunity to respond to those issues the Court deemed colorable." See Appellant's Brief, p. 18. However, a motion for sanctions places both the party and its attorney on notice that the court may assess sanctions against either the attorney or the party. Devaney v. Continental American Ins. Co.. 989 F.2d 1154,

1160 (11th Cir. 1993); See also, Levin & Assoc. v. Rogers, 156 F.3d 1135, 1142 (11th Cir. 1998)(holding that the filing of numerous motions for sanctions is sufficient put the attorney on notice of the potential imposition of sanctions by the court to satisfy the requirements of due process). Moreover, Local Rule 7.1, which Tunstall is responsible for knowing and following, requires a party opposing a motion to file a responsive memorandum in opposition to the motion, and provides that "[f]ailure to file a memorandum may be sufficient cause to grant the motion." *Id.*

Here, after the defendant filed his motion to compel, non-party Deese responded by filing a motion for protective order and a motion for sanctions against the defendant. In response Tunstall did not file a memorandum in opposition to Deese's motion for sanctions as required by Local Rule 7.1. Further, the defendant was given notice that the December 8, 2004, hearing before the magistrate judge was in reference to both his motion to compel and Deese's motion for sanctions. In Deese's motion for sanctions, he accuses Tunstall of uncivil and unprofessional abuses of the judicial process. Deese's counsel repeated those accusations before the magistrate judge during the hearing. Notably, however, Tunstall admits that during the hearing, he decided to focus solely on his own Motion to Compel, and to not address the arguments made against him personally regarding improper conduct. By Tunstall's own admission, then, he had an opportunity to be heard on the issue of sanctions, but instead chose to remain silent and leave the improper conduct accusations made against him unrebutted.[7]

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[7] Tunstall asserts that he was interrupted twice during the hearing when he tried to refute Posey's arguments. While the transcript of the hearing does reveal that Tunstall was redirected to the adequacy and timeliness of the subpoena when he attempted to address the scope of permissible discovery. *See* Transcript, Doc. 11, p.27, Tunstall still had

APPENDIX B

Other than defendant's assertion that he was not provided adequate notice and opportunity to be heard regarding sanctions, the defendant does not argue that the magistrate judge's order is contrary to law. Instead, the defendant simply reargues the facts which predicated the magistrate judge's order, and contends that the magistrate judge's factual findings are not supported by the record. The magistrate judge's order stated, in relevant part, "The court finds that Mr. Tunstall has failed to serve a valid subpoena, failed to take reasonable steps to avoid placing a burden on Mr. Deese, failed to cooperate in the resolution of the issues raised here, and otherwise failed to act professionally." Therefore, the magistrate judge granted Deese's request for sanctions, including the fees and costs associated with resisting the subpoena.

On appeal, defendant strenuously argues that Posey misrepresented the facts before the magistrate judge regarding Tunstall's previous communications with her,[8] and also that the Southern District of Alabama's previous orders limiting discovery did not address the same type of requests

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ample opportunity at other times to address the issue of sanctions, and at no point did he attempt to refute the allegations regarding potential unprofessional behavior on his part.

[8] For example, at the hearing Posey asserted that Tunstall had previously informed her, via another attorney in his office building, that she could only contact him through the mail; therefore, she could not telephone or fax Tunstall to discuss her objections to the subpoena. On appeal, Tunstall adamantly refutes Posey's contention, and argues that he never informed Posey that she could not telephone, e-mail or fax him. Instead, Tunstall asserts that sometime in 2004, for reasons not clear from the record, Posey attempted to fax Tunstall correspondence by sending her fax to another attorney, Mr. Mudd, located in Tunstall's office building but completely unrelated to Tunstall's law firm. After consultation with Tunstall, Mudd informed Posey that she should not attempt to contact Tunstall through Mudd's office. The record is not clear why Tunstall's office was apparently unstaffed at times.

at issue in Deese's subpoena. In support of defendant's argument, he offers affidavits from witnesses and copies of orders previously entered by the Southern District of Alabama. The problem with defendant's proffer of new evidence on appeal, however, is that this court is limited to reviewing the magistrate judge's order under a clearly erroneous standard. Under the clearly erroneous standard, it is inappropriate to consider evidence not presented to the magistrate judge. Haines v. Liggett Group, Inc., supra, 975 F.2d at 93. See also e.g., Chase Manhattan Bank v. Iridium Africa Corp., 2003 WL 22928042 (D. Del 2003) (holding that the district court may not consider evidence and materials which were not before the magistrate judge); SmithKline Beecham Corp. v. Apotex Corp., 2000 WL 1310669 (N.D. Ill 2000)(noting that permitting the introduction of new evidence on appeal is essentially conducting an impermissible de novo review of the magistrate judge's order); Scott Paper Co. v. United States, 943 F. Supp. 501 (E.D.Pa. 1996).

At the hearing, Tunstall did not attempt to refute Posey's assertion that he had refused to accept phone calls or e-mails from her. Instead, he remained silent and waited until this appeal to offer evidence to the contrary. As defendant's counsel concedes, all of this information was available before the December 8, 2004, hearing before the magistrate judge.

Further, even if I disregard the Magistrate Judge's finding that Tunstall acted unprofessionally, the magistrate judge also imposed sanctions because the defendant issued an invalid subpoena and failed to take reasonable steps to prevent an undue burden on the non-party. Based on a review of the original subpoena issued, the magistrate's conclusion that the subpoena was overly broad and created an undue burden on non-party Deese is fully supported by the record. Although the defendant did significantly narrow the

scope of his discovery requests in subsequent conversations with Deese's attorney and through his motion to compel, it was the original invalid and overly broad subpoena that caused Posey and Deese to invest time and effort in attempting to obtain relief. Therefore, the magistrate judge's imposition of sanctions was not clearly erroneous or contrary to law.

III. CONCLUSION

For the. foregoing reasons, the decision of the magistrate judge is AFFIRMED.

DONE AND ORDERED this 22nd of September, 2005.

/s/ Roger Vinson
ROGER VINSON
Senior United States District

APPENDIX C

FILED MARCH 10, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

THE CINCINNATI INSURANCE
COMPANY,
Plaintiff,

vs. No. 5:04mc2/RV/MD

MATTHEW LEATH COCHRAN,
Defendant.

ORDER

This action is pending in the United States District Court for the Southern District of Alabama. Plaintiff sued the defendant in a declaratory judgment action seeking to deny coverage on a fire insurance policy on the ground of arson by the insured, defendant Matthew Cochran. Defendant counterclaimed, and after a complicated procedural battle asserted claims of bad faith, breach of contract, and conspiracy. As part of his discovery defendant's counsel issued a subpoena duces tecum directed to a non-party, Fire Engineering Consultants, Inc. (FECI) and one to R. Harold Deese, both of Panama City, Florida. After there was no response, defendant moved to compel production of the documents described in the subpoena(s). R. Harold Deese filed a motion for protective order, which was granted by this court after a hearing. (Doc. 6). Mr. Deese was given ten days to file admissible evidence of the actual expenses that he incurred in obtaining the relief granted in this order. Mr.

APPENDIX C

Tunstall, counsel for the defendant, was afforded ten days to file evidence in opposition. Mr. Deese filed his response in support of the granting of fees (doc. 7), noting expenses of $2,555.73 for himself and $3,505.64 in total legal fees and expenses for counsel. Counsel for the defendant has not filed any response in opposition to the non-party's request.

Rule 45(c)(1) of the Federal Rules of Civil Procedure provides in part that a party or attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Because the court found that counsel for the defendant had not taken such reasonable steps, it determined that a monetary sanction would be awarded. (Doc. 6). The rule further provides that the sanction may include, but is not limited to, lost earnings and a reasonable attorney's fee. In its order granting the motion for protective order, the court advised the parties that it would take the issue of the amount of the monetary sanction under advisement without a hearing. As noted above, defense counsel Mr. Tunstall filed no response or objection. Failure to file a responsive memorandum may be sufficient cause to grant relief. N.D. Fla.Loc.R.7.1(C)(1).

Mr. Deese's $2,555.73 in expenses is itemized as follows:

4.5 hours travel to Pensacola for meeting with counsel[1]	$ 337.50	[$75 per hour]
4.7 hours travel to Pensacola for meeting with counsel	$ 352.50	[$75 per hour]
1.5 hours meeting with attorney	$ 202.50	[$135 per hour]
1.2 hours reviewing files to respond to subpoena	$ 162.00	[$135 per hour]
1.5 hours search storage for files	$ 202.50	[$135 per hour]

[1] Meeting cancelled due to Hurricane Ivan.

APPENDIX C

546 miles (2 trips)	$ 273.00	
24.75 clerical hours	$ 866.25[2]	[$35 per hour]
14 photocopies	$ 3.50	
Florida Sales Tax 6 ½ %	$ 155.98	

Ms. Posey's time is broken down into increments as small as 3 minute blocks of time. She reports that she expended a total of 23.30 hours on this matter at a rate of $150 per hour, for total fees in the amount of $3,495.00. She also reports expenses of $10.64, for a total of $3,505.64.

"The first step in computing a reasonable fee is to determine the lodestar, which is the product of the number of hours reasonably worked by a lawyer and a reasonable hourly rate." *Dillard v. City of Greensboro*, 213 F.3d 1347, 1354 (11th Cir. 2000). Because the court is guided by equitable principles in determining a reasonable fee, *Durrett v. Jenkins Brickyard, Inc.* 678 F.2d 911, 917 (11th Cir. 1982)(citing *Faraci v. Hickey-Freeman Co.*, 607 F.2d 1025, 1028 (2nd Cir. 1979), those principles must necessarily be employed in determining both the reasonable hourly rates to be employed and the number of hours reasonably worked. The Supreme Court has repeatedly stated that the lodestar "is presumed to be the 'reasonable fee' to which counsel is entitled." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) (Delaware Valley I) (quoting *Blum v. Stenson*, 465 U.S. 886, 897, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)); *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 728, 107 S.Ct. 3078, 3088, 97 L.Ed.2d 585 (1987) (Delaware Valley II); *City of Burlington v.Dague*, 505 U.S. 557, 562, 112 S.Ct. 2638, 2641, 120

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[2] The figure on the explanatory page is actually $.35 less due to differences in line calculations. ($869.40 less $3.50 in photocopies is $865.90).

L.Ed.2d 449 (1992). Upward adjustments of the lodestar figure are permissible only in "rare and exceptional cases supported by both specific evidence on the record and detailed findings by the lower courts." *Delaware Valley I*, 478 U.S. at 565, 106 S.Ct 3088 (internal quotations and citation omitted); *Delaware Valley II, supra*, (citing *Blum*, 465 U.S. at 898-901,104 S.Ct. at 1548-50); see also *Loranger v. Stierheim*, 3 F.3d 356, 362 (11th Cir. 1993). The burden is on the non-party's counsel, as the fee applicant, to establish entitlement to the requested award, including any enhancements. *Hensley*, 461 U.S. at 437, 103 S.Ct. at 1941; *Dague*, 505 U.S. at 562, 112 S.Ct at 2641; *Blum*, 465 U.S. at 898, 104 S.Ct. at 1548-49.

This is not a case in which an enhancement of fees would be appropriate, and in any event Mr. Deese's counsel does not seek an enhancement. Based on a review of her submissions in this case and her preparedness for the hearing held on the motions to compel and for protective order, the court finds both the time expended in this matter and the hourly rate charged to be reasonable.

Mr. Deese's reported expenditures must be scrutinized more carefully. His out-of-pocket losses (mileage, photocopies and secretarial) are recoverable, but that does not necessarily include the value of his own time. Unlike the award of attorney fees, which a client incurs and must pay, the client's own loss is not so easily determined. In this case if Mr. Deese was an hourly employee and showed an actual loss of income for the time spent in this case, an award of the actual loss would be an easy matter to determine. Mr. Deese is not such a person, however. He is a self-employed expert consultant in the fire loss industry. As such, he can charge fees for his services. Here, however, he was not performing services for a client, but was acting in his own behalf. The court understands that Mr. Deese's time has value when it is

engaged by a third party. However, Mr. Deese has not shown that he actually lost the value of his time. That is, he has not shown that he had to give up this time in favor of other income-producing time, such as by losing other potentially paying work. Under these circumstances, it would be an abuse of discretion for this court to award Mr. Deese for income that he has proven was actually lost. The amount claimed for sales tax is not explained, and does not appear to have actually been paid to the State. It is therefore not included.

___Accordingly, it is ORDERED:

Within a reasonable time, Stephen M. Tunstall, Esq., counsel for defendant Matthew Leath Cochran, shall pay $3,505.64 to Melissa A. Posey, Esq., and $1,215.75 to R. Harold Deese.

DONE AND ORDERED at Pensacola, Florida this 10th day of March, 2005.

/s/ Miles Davis
MILES DAVIS
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

FILED DECEMBER 9, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

THE CINCINNATI INSURANCE
COMPANY,
Plaintiff,

vs. No. 5:04mc2/RV/MD

MATTHEW LEATH COCHRAN,
Defendant.

ORDER

This action is pending in the United States District Court for the Southern District of Alabama. Plaintiff has sued the defendant in a declaratory judgment action seeking to deny coverage on a fire insurance policy on the ground of arson by the insured, defendant Matthew Cochran. Defendant counterclaimed, and after a complicated procedural battle now asserts claims of bad faith, breach of contract, and conspiracy. As part of his discovery defendant's counsel issued a subpoena duces tecum directed to a non-party, Fire Engineering Consultants, Inc. (FECI) and possibly one to R. Harold Deese, both of Panama City, Florida. Defendant says that the subpoena(s) was served, but that there was no response. He now asks the court to compel production of the documents described in the subpoena(s). R. Harold Deese has filed a motion for protective order. A hearing pursuant to notice was held on December 8, 2004.

APPENDIX D

Rule 45

Rule 45, Fed. R. Civ. P., deals with subpoenas. Relative to this proceeding, Rule 45(1) provides that every subpoena shall (A) state the name of the court issuing the subpoena, (B) state the name of the court where the action is pending, (C) command the recipient to produce documents for inspection or copying at a specified time and place, and (D) set forth the text of two subdivisions of the Rule. The referenced subdivisions, Rule 45(c)(and (d), provide in pertinent part that the party responsible for the issuance of the subpoena shall take reasonable steps to avoid imposing undue burden or expense on the person served, and that the person served may make timely objection. On timely motion made the court may modify or quash the subpoena if it (a) fails to allow reasonable time for compliance, or (b) requires a non-party to travel more than 100 miles.

Timeliness of Mr. Deese's objection.

Before addressing the merits, the court must consider whether the motion for protective order served on November 10,2004 was timely. Rule 45(c)(2)(B) provides that a person served with a subpoena may object within 14 days, or within the time provided for responding, whichever is less. The subpoena was served, if it was served (as will be discussed below), on September 21, 2004 and provided ten days to object. Rule 6 provides that where the subpoena was served by mail, as was done here, three days are added, and where the period of time allowed is less than 11 days, as it was in this case, intervening week-ends and legal holidays are excluded. Since there were two intervening week-ends, the time for objecting was extended to October 8, 2004.

Rule 6 further provides that the time for responding may be enlarged by the court where the failure to act was the result of excusable neglect. The court judicially knows that

the Southern District of Alabama and the western part of the Northern District of Florida, including the Panama City, Pensacola, and Mobile areas, were hit by a category 3 or 4 storm, Hurricane Ivan, on September 16, 2004, five days before the subpoena was served. Mr. Deese's counsel, Ms. Posey, represented at the hearing, and defendant's counsel did not contend otherwise, that due to storm damage, the loss of communications, and the extraordinary circumstances surrounding recovery efforts necessitated by the storm, Mr. Deese was unable to make contact with her until early October. Ms. Posey says that rather than file an objection after consultation, she tried unsuccessfully to contact defendant's counsel to attempt to work out a compromise on the breadth and scope of the discovery requested. Then, on October 11, because Mr. Tunstall had earlier told her that he would communicate with her only through the mail,[1] she mailed letters to each of Mr. Tunstall's addresses in Mobile, objecting to the subpoena, pointing out its various technical defects (discussed below), and offering to try to come to a mutual agreement on how the defendant's requests could be satisfied expeditiously and without undue cost. The letters were returned unclaimed after attempted delivery by the Postal Service on October 12, 16, 21, 27, 31 and November 2. (Witness exhibits 3 and 4). The two attorneys did manage to consult by telephone on October 18 and seemingly reached an agreement, but the confirmatory letter sent by defendant's counsel, and an apparent follow-up sent on November 9 did not agree with Ms. Posey's understanding of the agreement, and she so informed Mr. Tunstall by letter of that same date. Then, without responding and further consultation, Mr. Tunstall filed the instant motion to compel.

In an earlier proceeding in the district where the action

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[1] This was a disappointing reflection on his civility and professionalism that Mr. Tunstall made no effort to contest.

is pending, Magistrate Judge Cassady found that what appear to be identical or nearly identical requests directed to another witness were overbroad, quashed the subpoena, directed Mr. Tunstall to narrow his requests, found that Mr. Tunstall had not taken reasonable steps to avoid placing a burden on the witness, and sanctioned him. What is noteworthy about this is its timing. The hearing before Judge Cassady was held on October 14, 2004, immediately before Ms. Posey started attempting to accomplish a similar result. By the time the October 14 hearing was over Mr. Tunstall was clearly aware that his requests were overbroad, and that he had not taken reasonable steps to avoid placing a burden on Mr. Deese or FECI. Yet the next day, and four times thereafter, he refused delivery of correspondence from an attorney with whom he refused to communicate on the telephone.

Given the foregoing circumstances, the court concludes that Mr. Deese's objections to the subpoena were not untimely. Although it would have been the better practice for Ms. Posey to have filed her objections and then tried to work out a settlement, the extraordinary conditions that existed in the aftermath of Hurricane Ivan, combined with Mr. Tunstall's transparently unreasonable but successful efforts to refuse communication after having learned from Judge Cassady that his requests were overbroad and failed to minimize the burden on the witness, followed by his continued insistence, even in this court, that the subpoena be enforced as presented, and further followed by his filing the instant motion without further consultation, excuse Ms. Posey's failure. While this is not precisely the excusable neglect the rule requires, it can accurately be described as excusable entrapment, under these circumstances a distinction without a difference.

APPENDIX D

Merits.

The court will now turn to the merits of defendant's motion to compel. It will be denied for the following reasons:

1. There is no proof that the subpoena was properly served.

The mail receipt counsel attached to his motion shows that a letter, presumably containing the subpoena, was delivered to "R. Harold Deese" on September 21, 2004 and signed for by "A. Stevens." In his motion to compel defendant asserts that he served a subpoena on "Fire Engineering Consultants, Inc. / Harold Deese." However, the subpoena was not addressed to Harold Deese, but rather to FECI. There is no proof in the limited record before this court that the subpoena was served on the corporation. The record contains nothing to indicate definitively that Harold Deese is an officer or director of the corporation or is otherwise authorized to accept service in its behalf. Moreover, defendant's motion makes repeated reference to claimed attempts to arrange with counsel for "Mr. Deese" (but not for FECI) to resolve the production issue. To complicate the matter further, the only party appearing here in opposition to the motion to compel is R. Harold Deese, but he does not concede that he was ever served with a subpoena directed to him individually. Thus, whether he was served is unclear. Without more, this court cannot say for certain that a subpoena was served on either non-party witness. For that reason alone defendant, who has the burden, has failed to show that production should be compelled.

2. The subpoena was not in proper legal form.

Contrary to the Rule 45 requirements outlined above,

the subpoena does not state the name of the court in which the action is pending, the Southern District of Alabama. More critically, is does not "set forth the text of subdivisions (c) and (d) of the Rule. Those subdivisions deal with protection and duties of the subpoenaed party, and outline that person's rights and obligations in seeking relief. Moreover, the subpoena commands production for inspection and copying documents (discussed in more detail below) at a specified place, date and time. The "Place" is not described. The Place is seemingly qualified by an entry reading "Or If by Mail: [at defendant's counsel's address in Mobile, Alabama]." The date and time are "Within 10 days of receipt of this subpoena." For all that appears, therefore, the non-party's only option was to take the documents to Mobile, or to mail them there, within ten days. The non-party was not instructed on how it could object, and pointedly was not told that it could seek relief if it was given insufficient time to respond or if it were required to travel more than 100 miles. The court judicially knows that Panama City, Florida is more than 150 miles from Mobile, Alabama.

3. The subpoena was not accompanied by fees or expenses.

Tender of a witness fee and mileage is required where a subpoena requires a witness to appear, and failure to do so renders the subpoena invalid. *CF& I Steel Corporation v. Mitsui & Co. (USA), Inc.*, 713 F.2d 494 (9th Cir. 1983). No witness fee is required for document production, however, but the rule clearly contemplates only document *production*, not appearance for document delivery. (A subpoena shall "command each person to whom it is directed ... to produce for inspection and copying of designated books, documents or tangible things...." Rule 45(a)(1)(C)). It further contemplates that the production take place where the records

are held. (The subpoena is issued in the name of the court in the "district in which . . . production is compelled." Rule 45(a)(3)). The challenged subpoena was issued in the name of this court because the records in question are located in this district. As shown above, however, production was not, "compelled" in this district. It was compelled in Mobile, Alabama. No fees or expenses were tendered for appearance in or travel to Mobile, or for mailing and copying, so the subpoena was invalid.

4. The requests are burdensome and overbroad.

The subpoena directed the corporate non-party to produce documents described in 27 paragraphs beginning with "any and all documents or objects that mention, refer, reflect or relate to" etc., all without reference to time, other than one request seeking documents from 1986 to the present. One request seeks documents related to financial arrangements with certain named individuals and entities and their "paralegals, secretaries, [&] employees." How financial arrangements with clerical personnel relates to this action has not been explained. Although this court has not been made privy to all the possible ramifications of producing the listed documents, defendant is apparently requesting files and records of every matter relating to fire investigations ever done by Fire Engineering Consultants, Inc. for or in concert with literally dozens of entities and persons without regard to time or geographical location. Mr. Tunstall has not pointed to any meaningful difference between this subpoena and the one found by Judge Cassady to have been overbroad, nor has he made any effort to explain how the circumstances in this proceeding are meaningfully different.

5. The instant motion was untimely.

Defendant's motion to compel was filed in this court on

APPENDIX D

October 26, 2004. Discovery in the underlying case ended October20, and the court's scheduling order required that all motions to compel be filed on or before that date. Mr. Tunstall says he attempted to telefax his motion to this court on October 20 and was told by a deputy clerk here that he could do so and then mail his pleadings. That may be so, but there is no fax in the file, this court does not accept faxed filings without leave of the presiding judge, and the clerk does not have authority to extend deadlines, much less deadlines imposed in another district.

Disposition

Where there are defects in a subpoena that can be cured by amendment and reservice, the better practice is to allow the requesting party that opportunity. However, this court will not extend the discovery deadline imposed by the court where the action is pending. If defendant wants further relief, his only resort is to seek it there. Therefore, the motion to compel should be denied in its entirety without leave to serve an amended subpoena unless such relief is granted by the United States District Court for the Southern District of Alabama.

Sanction.

The court finds that Mr. Tunstall has failed to serve a valid subpoena, failed to take reasonable steps to avoid placing a burden on Mr. Deese, failed to cooperate in the resolution of the issues raised here, and otherwise failed to act professionally. Ms. Posey requests fees and costs for resisting the subpoena. Given the lateness of her objections the court would ordinarily not be inclined to grant that request. However, since it appears that this entire controversy was initiated and prolonged by Mr. Tunstall's actions, and because the lateness was largely caused by Mr. Tunstall's

efforts at delay, the request will be granted.

Accordingly, it is ORDERED as follows:

1. Defendant Matthew Leath Cochran's motion to compel (doc. 1) is DENIED.

2. R. Harold Deese's motion for protective order (doc. 2) is GRANTED.

3. R. Harold Deese shall file, within ten days of the receipt of this order, admissible evidence of the actual expenses that he incurred in obtaining the relief granted in this order. Mr. Tunstall shall then have ten days to file evidence in opposition. The court will then take the issue of the amount of the monetary sanction under advisement without a hearing.

DONE AND ORDERED at Pensacola, Florida this 9th day of December, 2004.

/s/*Miles Davis*
MILES DAVIS
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

No. 05-15461-AA

----------**FILED**
U.S.COURT OFAPPEALS
ELEVENTH CIRCUIT
DEC 27 2006
THOMAS K. KAHN
CLERK

THE CINCINNATI INSURANCE COMPANY,

Plaintiff,

R. HAROLD DEESE,
Interested

Party-Appellee,

versus

MATTHEW LEATH COCHRAN,
FOREIGN AUTO PARTS OF MOBILE INC.,
PROFESSIONAL ENGINE SERVICE OF MOBILE,

Defendants-Appellants,

STEPHEN M. TUNSTALL

Appellant.

Appeal from the United States District Court for the
Northern District of Florida

ORDER:

Stephen M. Tunstall's motion to supplement the record on appeal to include his affidavit is denied.

/S/ J. L. EDMONDSON
CHIEF JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-15461-AA

Filed
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 27 2006
THOMAS K. KAHN
CLERK

THE CINCINNATI INSURANCE COMPANY,

Plaintiff,

R. HAROLD DEESE,

Interested Party-Appellee,

versus

MATTHEW LEATH COCHRAN,
FOREIGN AUTO PARTS OF MOBILE INC.,
PROFESSIONAL ENGINE SERVICE OF MOBILE,

Defendants-Appellants,

STEPHEN M. TUNSTALL

Appellant.

On Appeal from the United States District Court for the
Northern District of Florida

BEFORE: EDMONDSON, Chief Judge, ANDERSON and BIRCH, Circuit Judges.

APPENDIX F

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bane (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Bane are DENIED.

ENTERED FOR THE COURT:

/S/ J. L. EDMONDSON
CHIEF JUDGE

ORD-42
(2/05)

APPENDIX G

Federal Rules of Civil Procedure Rule 45

Rule 45.Subpoena

(a) Form; Issuance.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically s tored information is to be produced.

(2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, from the court for the district where the trial or hearing is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production, inspection, copying, testing, or

sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena or at

any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena. When a statute of the United States provides therefore, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28 U. S.C, § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

APPENDIX G

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises -- or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

APPENDIX G

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide

discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a

subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).